

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of BellSouth Telecommunications, Inc.)	
For Forbearance Under 47 U.S.C. §160(c) From)	WC Docket No. 04-405
Application of Computer Inquiry and Title II)	
Common-Carriage Requirements)	

**REPLY COMMENTS OF
THE FEDERATION OF INTERNET SOLUTION
PROVIDERS OF THE AMERICAS**

The Federation of Internet Solution Providers of the Americas (“FISPA”), by its attorneys, hereby submits its Reply Comments to the October 27, 2004, Petition for Forbearance filed by BellSouth Telecommunications, Inc. (“Petition”).¹

INTRODUCTION

The comments representing the competitive side of the industry, the non-incumbents, unanimously support FISPA’s Opposition to BellSouth’s Petition.² Even some incumbent providers oppose BellSouth’s Petition.³ This should come as no surprise to the Commission because the wealth of evidence, as exhibited in the Declarations of FISPA members submitted with its Opposition, shows that today’s broadband marketplace, particularly for wholesale

¹ Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements, WC Docket No. 04-405 (Oct. 27, 2004).

² See generally, Comments of DSLExtreme.com, Comments of McLeodUSA Telecommunications Services, Inc., Comments of Sonic.net, Opposition of Computer Office Solutions Inc. d.b.a. SnappyDSL.net, Opposition of Computer Technologies Group, Inc., Opposition of Computer Office Solutions Inc. d.b.a. SnappyDSL.net, Comments of Vonage Holdings Corp., Comments of FDN Communications, Inc. & Pac-West Telecomm, Inc., Comments of Time Warner Telecom, XO and Cbeyond, Comments of Dean Brooks/IgLou Internet Services, Inc., Comments of ALTS, Comments of Earthlink, Inc., Comments of Computers-N-Service Internet, Inc., Comments of AT&T Corp., Comments of NATOA et al., Comments of TerraNovaNet Internet Services, Opposition of MCI, Inc., Comments of SouthEast Telephone, Inc. and KYISPA, Opposition of FSM Marketing Group, Inc., Comments of California ISP Association, Inc., Comments of CompTel/ASCENT, Comments of TEXALTEL, Opposition of Peter Radizeski, Comments of Kinex Networking Solutions, Inc., Comments of Information Technology Association of America, Comments of Norman Schippert c/o BluegrassNet.

³ See Comments of Sprint Corporation and Comments of The Nebraska Rural Independent Companies.

services, is not sufficiently competitive. The current environment provides BellSouth with the incentive to continue leveraging its market power to engage in unfair, anticompetitive practices against independent ISPs. The evidence in this record, and far more than can be gathered, prove that BellSouth's claim that it lacks the ability to dominate the broadband marketplace is simply untrue. Far to the contrary, as the vast majority of commenters argue,⁴ the current state of competition in the market for wholesale broadband services necessitates the denial of BellSouth's Petition so that the appropriate economic and regulatory safeguards of Title II and the *Computer Inquiry* rules continue to protect the independent ISPs' ability to compete.⁵

Indeed, Title II common carriage and *Computer Inquiry* requirements need not only remain, but their application expanded and made more effective. Experience shows that, as BellSouth became more active in the retail DSL marketplace in recent years, the mere existence of Title II and *Computer Inquiry* safeguards failed to sufficiently deter BellSouth from engaging in anti-competitive behavior towards its wholesale DSL customers (and retail competitors), including many FISPAs members. Given the absence of a competitive market for wholesale broadband services, BellSouth's unfair business practices will only increase if the requested forbearance is granted. This much is evident in the marketplace abuses described and attested to by FISPAs members in the Declarations submitted with its Opposition. FISPAs awaits BellSouth's Reply to see what it can produce to overcome the factual evidence of its existing marketplace abuses. But, BellSouth cannot undo its actions as reported to the Commission.

⁴ See *Id.*, footnote 2.

⁵ LexiSoft Declaration at ¶ 4 ("Due to existing conditions in the markets in which our company provides ISP services, **our company remains highly, if not entirely, dependent on existing Title II and/or Computer Inquiry requirements to obtain access to BellSouth and/or other ILEC wholesale transmission services** which are essential to provide broadband ISP services to our existing and prospective customers.") (emphasis added); CSSLA Declaration at ¶ 4 (accord); SiteStar Declaration at ¶ 4 (accord); WebKorner Declaration at ¶ 4 (accord); Kinex Declaration at ¶ 4 (accord); Bayou Declaration at ¶ 4 (accord); GoldCoast Declaration at ¶ 4 (accord); ECSIS Declaration at ¶ 4 (accord); COL Declaration at ¶ 4 (accord); Supernova Declaration at ¶ 4 (accord); Computer Office Solutions Declaration at ¶ 4 (accord); Mecklenburg Communications Declaration at ¶ 4 (accord); WCK Declaration at ¶ 4 (accord); C-N-S Declaration at ¶ 4 (accord); Acceleration Declaration at ¶ 4 (accord).

Indeed, the evidence of record requires that the Commission not only deny BellSouth's Petition, it strongly supports the need for the Investigations and Hearings Division of the Enforcement Bureau to open an investigation of BellSouth's compliance with existing Title II and *Computer Inquiry* rules. The Commission has done so in other cases in which an incumbent's behavior raised serious questions about compliance with Commission directives designed to prevent anti-competitive and abusive behavior.⁶ FISPA and other commenters support doing so here.⁷

I. FISPA MEMBERS' EXPERIENCES WITH BELL SOUTH'S CURRENT ANTI-COMPETITIVE BEHAVIOR FIND SUPPORT FROM OTHER COMMENTERS

FISPA members are not alone. Their experiences trying to compete in the retail broadband market against BellSouth and other ILEC DSL transport wholesalers is commonplace; from predatory pricing to prices squeezes to outright tortious interference, ISPs have experienced it all at the hands of the dominant ILECs.

DSLExtreme.com summarizes well the all too common anti-competitive pricing tactics of the ILECs:

"ILECs. . . have engaged in predatory pricing with their DSL transport offering for years now. As long as it costs an ISP more to buy the inputs for DSL services from an ILEC than the combined cost of that ILEC's ISP DSL retail price, [BellSouth's] Petition cannot be granted. Such a pricing policy is unjust, unreasonable, and discriminatory on its face." See Comments of DSLExtreme.com at 2.

And MCI's Opposition explains how these pricing practices, absent tariff regulation, will result in a price squeeze:

"[i]n the absence of Title II's tariffing requirements, BellSouth could charge significantly above-cost prices for wholesale DSL service in order to subject non-affiliated ISPs to a price squeeze. BellSouth's affiliated ISP could absorb the increased costs and continue to

⁶ See FCC Enforcement Bureau website listing of Local Telephone Competition Enforcement Action, available at: <http://www.fcc.gov/eb/LoTelComp/enf.html>

⁷ See Comments of DSLExtreme.com and Comments of Sonic.net.

offer a competitively priced Internet access product. Non-affiliated ISPs, however, would [sic] little choice but to pass the higher DSL costs on to their end users. This would of course, result in a loss of customers to the lower priced services of BellSouth's affiliated ISPs. Ultimately, BellSouth and other LECs could substantially reduce, or eliminate completely, non-affiliated ISPs in the Internet access market.”⁸

FISPA's Opposition demonstrates that MCI's prediction of the future for non-affiliated ISPs is all too accurate. Simply put, if forbearance is granted, the independent ISP will cease to be. That such a result is inevitable has been testified to by many FISPA members in the Declarations files with its Opposition. For the Commission's convenience and by way of emphasis here are some excerpts.

From FISPA member Computer Office Solutions:

“Our company has experienced anti-competitive marketplace pricing by [BellSouth]. BellSouth's aggressive discounts from the retail prices, purchase of bundled service and long term contracts (3 years) [which] allows for very little differential between these discounted prices and our company's wholesale costs. As such, BellSouth's pricing tactics create a tremendous amount of business pressure on our company simply to sustain our customer base and maintain the existence of our company. From our perspective, it appears very easy for the BOCs to sustain heavy losses in one division and yet offset them from profits made from another division (e.g., sustained losses from the DSL/Broadband Division are offset from the profits gained from their Local, Long Distance, and Business Data Divisions). Due to this ability to cross-subsidize, we believe BellSouth is able to maintain artificial market pressure (engage in price squeeze) on smaller competitors such as independent ISPs, including our company. The medium term effects of these anti-competitive pricing tactics are clearly visible, i.e., large ISPs are exiting the Broadband Business: Direct TV exited Broadband in 4Q/2002, MSN exited Broadband in Q1/Q2/2003, and AOL is exiting by Q1/2005. The longer term effects, if not addressed, will force smaller ISPs out of business as well.... [and granting forbearance] will only accelerate the demise of small independent ISPs.” *Computer Office Solutions Declaration* at ¶¶ 9- 11.

Mecklenburg Communication declared that it has “experienced everything from below wholesale cost pricing to intentionally slow installations....” *Mecklenburg Communication Declaration* at ¶ 8.

⁸ MCI Opposition at p. 11.

Similarly, COL Networks complains that its:

“... current wholesale price for a DSL line is nearly three times BellSouth’s ‘DSL Lite’ service, which retails for \$9.95 per month. ...BellSouth’s wholesale pricing far exceeds the retail pricing available to their [sic] own customers. Our company cannot offer our customers the same deals, ultimately making our services less attractive to prospective customers.” *COL Declaration* at ¶ 9.

Another independent ISP, Supernova, declared that it found that its “ILEC wholesalers/competitors sell retail DSL services below what it costs [the] company to purchase the same services at wholesale.” *Supernova Declaration* at ¶ 8.

ISP Kinex declared that it is forced to operate in a marketplace where:

“... current wholesale price for a DSL line exceeds the \$24.95 retail price of our ILEC wholesaler/competitor’s DSL service by over \$10 per line. In addition our ILEC wholesaler/competitor provides its customers with free modems. Our company cannot offer our customers the same deal, ultimately making our services less attractive to prospective customers.” *Kinex Declaration* at ¶ 10.

Computers-N-Service Internet declared it has been the victim of BellSouth’s “bundling and packaging DSL below wholesale cost and leveraging other services, like local dial-tone and long distance, to win DSL business.” *C-N-S Declaration* at ¶7.

ISP Computer Sales & Services is in a similar situation and declared that its:

“... current wholesale price for a DSL line exceeds BellSouth’s retail prices for the same service. In addition, BellSouth provides installation and essential equipment to its DSL customers at costs lower than those charged to [CSSLA]. [The] company simply cannot compete on a level playing field with [its] wholesaler/competitor, ultimately making [its] services less attractive to prospective customers.” *CSSLA Declaration* at ¶ 8.

For ISP, Sitestar, the company declared that it:

“... happily signed up as an ISP partner when [its] ILEC wholesaler/competitor launched its wholesale DSL program. However, over time [the] ILEC wholesaler/competitor reduced the retail price of its own DSL service to within \$10 and now \$5 of [Sitestar’s] wholesale costs. These pricing tactics result in a price squeeze, which if sustained over time will force [Sitestar], and others like it, out of business.” *SiteStar Declaration* at ¶ 9.

These, and the many other cited examples, reflect only a fraction of the anti-competitive practices in which BellSouth is currently engaged. Remarkably, these practices are all happening with the regulatory safeguards of Title II and *Computer Inquiry* still in place! There is no doubt that, without economic regulations, anti-competitive pricing will expand until competition is gone.

But BellSouth's anti-competitive behavior toward independent ISPs does not end with the price-squeezing and cross-subsidization seen today. Independent ISPs are also experiencing widespread "DSL slamming" by incumbents like BellSouth. *See CSSLA Declaration* at ¶ 9; *ECSIS Declaration* at ¶ 8. It is commonplace for BellSouth to solicit DSL business from independent ISP customers when the customers call about or are called by BellSouth regarding issues with their telephone service. *ECSIS Declaration* at ¶ 8. In other instances, BellSouth technicians installing DSL circuits for the independent ISPs are known to hang "Fast Access" door hangers on the customer's door and call customers to inform them that their Fast Access service is ready. *C-N-S Declaration* at ¶ 7. These calls confuse and frustrate the independent ISPs' customers and improperly trade on the ISPs' goodwill.

Other "dirty tricks" used by BellSouth include unlawfully disconnecting customers of non-affiliated ISPs as a ploy to contact the ISP customer and "inform him that BellSouth could restore service within 24 hours if the customer switched to BellSouth.net, but if they remained with [the independent ISP] it would take up to five (5) days to restore service." *Bayou Declaration* at ¶ 11. When BellSouth's wholesaler/competitor wins a customer from the independent ISP, installation of the service is complete within a matter of days. When a non-affiliated ISP requests installation for one of its customers, it can take over 30 days. *Mecklenburg Declaration* at ¶8.

It should also be obvious that without the existing economic regulations, BellSouth is free to cross-subsidize between unregulated and regulated services. The Commission has found that cross-subsidization can harm consumer choices in the unregulated market, thus making Title II cost allocation rules a necessary safeguard against “improperly shifting costs from unregulated to regulated offerings” that in turn “can have adverse impacts ... on competition in unregulated markets, by providing an opportunity for carriers to charge artificially low prices for their unregulated goods and services.”⁹

As MCI argued, “[a]s long as the carriers that own the broadband transmission networks can exercise market power ... they will exercise that market power by controlling downstream markets that depend on those transmission services.”¹⁰ The “Commission has long recognized the need to safeguard against the potential for a carrier with market power in an upstream market to leverage its power to harm competition in a down stream market.”¹¹ Since it is undeniable that BellSouth has market power in the physical layer of the IP-based networks, the Commission must safeguard against the potential of BellSouth using this lower layer power as leverage to harm competition downstream in one of the higher layers (*e.g.*, application or content layers).

⁹ *In the Matter of Amendment of Section 64.702 of the Commission's Rules (Third Computer Inquiry)*, Report and Order, 104 F.C.C. 2d 958 ¶ 234 (1986) (history omitted).

¹⁰ MCI Opposition at pp. 2-3.

¹¹ *Id.* at p. 3; *see, e.g., Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756 (1997) (“LEC Classification Order”); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d ¶ 299 (1980); *see also*, Earthlink Opposition at p. 30 (commenting that forbearance will defeat the goal of the Act because the consumers “will not have the full benefits of competition, such as competitive pricing...”).

II. A COMMISSION INVESTIGATION IS WARRANTED.

In 1999, the Commission promised to vigorously enforce its *Computer Inquiry* rules -

*The Commission will not hesitate to use its enforcement authority, including the Accelerated Docket or revised complaint procedures, to review and adjudicate allegations that a BOC is falling short of fulfilling any of its CEI obligations.*¹² (emphasis added).

To date, however, there is no evidence the Commission has exercised its enforcement authority in any meaningful way. As the Declarations of FISPAs members and the comments of other ISPs attest, this lack of enforcement is not for want of alleged violations.¹³

When the Commission issued its stern warning six years ago, the market for broadband services was in its infancy;¹⁴ ILECs such as BellSouth were just starting to deploy broadband DSL. Interestingly, the deployment that took place in these early years came primarily at the insistence and through the efforts of data-centric CLECs, such as Northpoint, Covad, and Rhythms, each of which catered to independent ISP demand for such advanced services. Circumstances today are different; Northpoint and Rhythms are gone and the few competitive alternatives to RBOC facilities that are left are rapidly drying up, especially those serving the residential market. Now, more than ever, independent ISPs must rely on RBOC bottleneck facilities to provide high-speed services to their customers. Recognizing this reliance, the RBOCs have redoubled their efforts to eliminate independent ISPs as a viable intramodal competitor, as the experiences of FISPAs members amply demonstrate.

¹² *In re Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, CC Docket No. 98-10, *Report and Order*, ¶ 7 (March 10, 1999) (hereinafter *Computer III Order 1999*), 14 FCC Rcd. 4289, ¶ 15.

¹³ See *id.*, footnote 7.

¹⁴ According to the Commission's Report, *High-Speed Services for Internet Access: Subscribership as of June 30, 2004*, Wireline Competition Bureau, Industry Analysis and Technology Division (December 2004), in December 1999 there were only 369,792 wireline subscribers of high speed lines. This number grew to 11,398,199 by 2004.

The scofflaw attitude shown by BellSouth should be viewed as an utter disrespect for Commission regulation, an attitude that FISPAs submit is attributable to two factors. First, the RBOCs engage in anticompetitive behavior towards small ISPs because history makes them confident that no formal legal action will be pursued to vindicate the small ISPs' rights. Most independent ISPs are small businesses and lack the financial and personnel resources necessary to prosecute a section 207 or 208 complaint, while at the same time running their operations, servicing their customers, and trying to survive on razor thin margins. The fact that well-healed RBOCs can and have litigated smaller competitors into oblivion is not lost on small ISPs who, over the years, have been repeatedly aggrieved by the anti-competitive business tactics that their larger ILEC competitor/wholesalers practice with impunity.

Second, RBOCs are equally confident that the Commission will not independently enforce the regulations that are on the books. FCC officials advocate bringing enforcement issues to the attention of the Commission -

“Issues can be brought to the attention of the Investigations and Hearings Division of the Enforcement Bureau. If the Division believes that a violation may have occurred, it can investigate and the FCC may pursue enforcement action on its own.”¹⁵

But the history of FCC enforcement actions pertaining to ILEC/ISP business dealings, or more appropriately lack thereof, give the RBOCs comfort that their anticompetitive marketplace behavior will escape meaningful sanctions or interdiction. Perhaps more troubling is that the Commission's inaction in response to countless informal and unpublished complaints lodged by

¹⁵ See, Robert Cannon, Senior Counsel for Internet Issues, Office of Plans and Policy, Federal Communications Commission, *Where Internet Service Providers and Telephone Companies Compete: A Guide to the Computer Inquiries, Enhanced Service Providers and Information Service Providers*, Version 0.7 at pg. 38. Available at: <http://www.cybertelecom.org/ci/guide.doc>

independent ISPs over the years has created a widespread belief that informing the Commission of rule violations will fall on deaf ears.

The Commission should be concerned that its existing enforcement mechanisms and past practices create significant barriers to small ISPs' (and for that matter, small businesses, in general) ability and desire to seek redress of the competitive harms they encounter with their ILEC competitors/wholesalers. The Commission should be concerned that its promises to promote true competition and to punish anti-competitive behavior ring hollow. The Commission should be concerned that it is being used to protect dominance in telecommunications. The Commission should be concerned that it is truly unnecessary to protect such dominance because the independent competitor does not want special considerations, they simply want to compete and are happy to compete against anyone, including the incumbents, if but the field of competitive battle is level for all players – not just the few big ones.

III. CONCLUSION

Absent pro-active enforcement, independent ISPs will continue to be punished in the marketplace. There is ample evidence in the record of this proceeding alone to warrant an independent investigation of BellSouth and other RBOCs' compliance with the mandates of Title II and *Computer Inquiry*. FISPAs join other ISPs and competitive companies in urging the Commission to deny BellSouth's requested forbearance and, instead, vigorously enforce these rules. To do otherwise would decimate independent ISPs, which are a vital, yet ailing, part of this nation's Internet economy.

RESPECTFULLY SUBMITTED,

**THE FEDERATION OF INTERNET SOLUTION
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